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Supreme Court of the United States

OCTOBER TERM, 1936

NO. 724

ALBERT A. CARMICHAEL, AS ATTORNEY GENERAL FOR THE STATE OF ALABAMA, ET AL., Appellants,

vs.

THE SOUTHERN COAL & COKE COMPANY, Appellee.

No. 797

ALBERT A. CARMICHAEL, AS ATTORNEY GENERAL FOR THE STATE OF ALABAMA, ET AL., Appellants,

vs.

GULF STATES PAPER CORPORATION, Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF AND ARGUMENT FOR APPELLANTS

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JURISDICTION

The same findings of fact and conclusions of law and the decree of the court below were filed December 15, 1936 in both cases. The petitions for appeal were filed and granted on January 20, 1937 and January 30th, 1937, respectively. The jurisdiction of this court is invoked under section 266 of the judicial code as amended (28 U. S. C., §380, 36 Stat. 557, as amended). Paragraph 1 of rule 12 of this court has been complied with and the statements made thereunder, and heretofore filed herein, are referred to for a concise statement of the grounds upon which the jurisdiction of this court is invoked.

STATEMENT OF THE CASES

1. The Decree To Be Reviewed.

These appeals are from the final decree of the Special District Court consisting of three judges, convened as provided by Section 380, Title 28, of the United States Code Annotated (Judicial Code, Section 266). That final decree restrained and enjoined the Defendant officers (Appellants here) (R. 298 in No. 724, R. 184 in No. 797), from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the Unemployment Compensation Act of the State of Alabama referred to in the bills of complaint, and which requires the Plaintiffs (the Appellees) as employers of eight or more persons within the State of Alabama, during the year 1936, to pay a tax equal to nine tenths (.9) of one (1) percentum of the total wages payable by them to their employees during the year 1936 in the State of Alabama into a state fund known as the Unemployment Compensation Fund, and also to deduct and withhold from such wages paid by them to their employees in the State of Alabama, after May 1, 1936, the sum of one (1) per centum thereof, being the tax imposed thereby upon Plaintiffs' employees, and to pay such further sum into such Unemployment Compensation Fund.[1]

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[1]The full text of the Alabama Unemployment Compensation Act, General Acts of Alabama, 1935, p. 950, as amended by General Acts of Alabama, special session 1936, pages 176, 225 and 228, and Acts No. ..... and Act No. ..... Extra Session 1936-1937 not yet officially published, is set out in the Appendix, filed herewith, at page 5.

The causes were submitted upon the Plaintiffs' applications for an interlocutory injunction (R. 158 in No. 724, R..... in No. 797) and were heard upon the verified bills of complaint (R. 1 to 27 in No. 724, R. 1 to 27 in No. 797), the motion to dismiss (R. 159 in No. 724, R. 32 to 35 in No. 797), the verified answer of the Defendants (Appellants) (R. 166 to 177 in No. 724, R. 45 in No. 797) and the affidavits introduced in evidence by the parties (R. 182 to 287 in No. 724, R. 69 to 176 in No. 797). By stipulation of counsel (R. 178 in No. 724, R. 65 in No. 797), the causes were also submitted for final decree upon the same pleadings and proof.

2. The Facts.

While the Plaintiff introduced a number of affidavits, in some degree repetitious, the essential facts are not disputed.

In the Southern Coal & Coke Company Case (No. 724) it is admitted that the Appellee (Plaintiff) carries on the business of mining and preparing coal for market in Alabama entirely in intrastate commerce, that it has substantial investments in plants and equipment in Alabama, and that it, and its employees, are in all respects subject to the terms and provisions of the Alabama Unemployment Compensation Act, if it is a valid and constitutional legislative enactment.

It is also admitted that the Appellants (Defendants) are the proper officers of the State of Ala-

bama charged with the enforcement of the Alabama Act, and that they demanded that the Appellee (Plaintiff), prior to the commencement of the suit, remit to them the contributions required from the Appellee and its employees by the terms of the Alabama Act.

It is admitted that the Appellee's operations are essentially seasonal in nature (R. 3, 162, 222). That its practice is to resort to a "spread-of-work" plan during slack seasons, in order to afford the maximum number of its employees minimum employment during times of partial operation. (R. 4, 224).

The Findings of Fact found by the District Court (R. 294 in No. 724) to the extent that it recites: "The evidence shows that petitioners here, and many other employers of hundreds of workers each, have a record of few or no discharges except for cause for a number of years past even during the recent depression, and have no prospect of unemployment in the future;" is clearly an inadvertent error on the part of the District Court as applied to this case, as it is clearly contrary to all averments of fact and evidence introduced as applicable to Appellee's business. It is averred in the complaint (R. 3) and admitted in the answer (R. 162) that plaintiff's business operation was idle 83 work days in 1930, 70 in 1931, 160 in 1932, 90 in 1933, 50 in 1934 and 105 in 1935.

The evidence shows, without conflict, that the coal mining industry in Alabama has been peculiarly affected by the evils of unemployment for the

past ten years. (R. 288 to 290). This evidence, the official publications of the Alabama Mining Institute, shows that during the period from 1926 to 1935 one hundred nineteen substantial coal mines in Alabama with railroad connections ceased operations altogether, resulting in the complete disemployment of approximately 9,000 mine employees, (R. 285). During this decade there has been a net decrease in total number of mine employees from approximately 30,000 to approximately 18,000, or about 40%. (R. 265). The production of coal in Alabama for distribution has declined from 21,500,000 tons in 1926 to 8,700,000 tons in 1935, the average production of coal per man per day in Alabama being 2.62 tons (R. 289). This decrease of 58.69% in coal production in 1935, as compared with 1926, would have resulted in complete disemployment of a far greater number of mine employees had not the coal mining operators generally adopted a spread-of-work system whereby the work available is distributed among a larger number of men than usual, but without increase in the total amount of wages paid. (R. 224). As a result of this and other causes, the total number of days work available to those persons still employed in coal mines in Alabama has decreased about 30% since 1926. (R. 285).

The Plaintiff (Appellee) introduced affidavits of a number of other employers in Alabama in unrelated businesses concerning unemployment in their own particular businesses during the past several years (R. 182, 208, 226, 230, 251, 255, 258, 267).

In the Gulf States Paper Corporation case, (No. 797) the facts show that it is engaged in the manufacture of kraft paper and kindred products; that it has been so engaged continuously since 1928 (R. 1, 2, 114 in No. 797) that in the year 1934 its operations were closed on two occasions, once for three weeks and once for two weeks on account of flood damages and for general repairs; that in the year 1935 its operations were suspended for about three months on account of a labor dispute. With these exceptions the plant has never been closed for as long as two weeks and such shut downs as have occurred have been at long intervals. (R. 7, 115 in No. 797). That since its establishment the plant has been operated twenty-four hours a day continuously throughout a work week of six days. That it began operation in 1928 with approximately 541 employees, that in 1933 it added approximately two hundred employees, and changed the basis of work from eight hour shifts to six hour shifts and since that time it has continuously employed approximatelly eight hundred men. (R. 7, 115 in No. 797).

That its employees are roughly divided into three groups, viz: (1) salaried employees (2) regular employees working on hourly basis and (3) a smaller group which is called upon for peak or unusual work, which is not permanent and continuous employment. (R. 7, 8 in No. 797). That the turnover in personnel in the first two groups has been small.

A large portion of its products are marketed in interstate commerce. Plaintiff's business has been aided by public donation (R. 64 in No. 797).

Except as noted here, the facts in this case are substantially the same as in the Southern Coal and Coke Company case.

3. The theory of the Bills of Complaint.

The Appellees base their claim for injunctive relief upon the contention that the Alabama Unemployment Compensation Act violates the due process and equal protection clauses of the Fourteenth Amendment, and that Titles III and IX of the Federal Social Security Act violate the Fifth and Tenth Amendments, to the Constitution of The United States.

The Special District Court, in its Conclusions of Law, (R. 296 in No. 724), held that the Alabama Unemployment Compensation Act denied to the Appellees and their employees due process and equal protection of the laws contrary to the provisions of Article I, section 23 of the Constitution of Alabama and of the Fourteenth Amendment to the Constitution of the United States, in that the classification of employers having eight or more employees is entirely arbitrary and that equal protection of the law is not afforded either to employers or employees. The Special District Court declined to pass upon any questions sought to be raised in reference to Titles III and IX of the Federal Social Security Act. (R. 297 in No. 724).

QUESTIONS PRESENTED

1. Whether the Alabama Unemployment Compensation Act (General Acts of Alabama, 1935, p. 950, as amended) violates any provision of the Constitution of Alabama.

2. Whether the Alabama Unemployment Compensation Act violates the due process or equal protection clauses of the Fourteenth Amendment.

3. Whether Titles III and IX of the Social Security Act (49 Stat. 626-639) are valid exercises of the powers delegated to Congress by the Constitution.

As to whether the validity of Title III or Title IX of the Social Security Act is involved in this case, the question is included here for the information of the Court in order to make complete the widest scope of the possible issues in the present litigation.

THE ALABAMA STATUTE

The Alabama Unemployment Compensation Act includes within its scope all employers and employees in establishments employing eight or more individuals, exempting those engaged in agricultural labor, domestic service in a private home, services as officers or members of a crew on a vessel in navigable waters of the United States, services performed for a son, daughter, or spouse, and service by a child under 21 years of age for his father or mother, services performed in the employ of the United States

Government or an instrumentality thereof, services performed in the employ of a state or instrumentality thereof, services performed in the employ of a religious, charitable, educational, scientific or literary body not operated for profit, services performed by employees of interstate carriers subject to the Railway Labor Act, and services performed by solicitors or agents of insurance companies. (Section 2 (g) as amended).

Every employer subject to the Act must contribute an annual sum for 1936, equal to nine-tenths of one per-cent of the total wages payable by him with respect to "employment" to a State fund known as the Unemployment Compensation Fund. Section 4 (b) (The contribution for 1937 will be 1.8 per cent and for 1938, 2.7 per cent.) Each "employee" after May 1, 1936 is required to contribute one percent of his wages. (Section 4 (d) as amended, (Acts 1936, page 227). The entire Unemployment Compensation Fund consists of these contributions.

The benefits are payable to those who establish loss of employment as defined by the law. (Section 6). They must first prove that they have been employed for a specified period in the year or two just preceding the unemployment. (Section 6 (a). The amount and the duration of the benefits are limited (Section 5 (b)) to 50 percent of the prior wage, but no more than $15 a week, and for not more than sixteen weeks (Section 5 (b)). Proportionate benefits are payable for partial unemployment. (Section 5 (c) (d)).

It is to be noted that benefits are payable to an employee only for his weeks of unemployment occurring subsequent to a "waiting period" whose duration must consist of an aggregate of three waiting period-units within the fifty-two weeks preceding the start of a week of unemployment. (Section 6 (c)). A "waiting period-unit" is defined as a period consisting of either one week of total unemployment or two weeks of partial unemployment. (Section 2 (p)). In the event of discharge for "misconduct" the waiting period is longer. (Section 6 (f) as amended). An employee after such period is regarded, however, as a part of the unemployment problem and becomes eligible for benefits. Also an employee who refuses suitable employment loses his claim to benefits for the week in which such refusal takes place and for three weeks thereafter. (Section 6 (g)). An employee whose claim to compensation is denied is entitled to a hearing before the Comission and may appeal its ruling to the courts of this state. (Sections 7, 8).

The contributions are pooled in the State Unemployment Compensation Fund (Section 3)—a central unit of reserve.

By Amendments to Sections 17 and 18, adopted by the legislature in 1936 and 1937, it is provided that in the event the Federal Social Security Act is held invalid by the Supreme Court of the United States or is amended or repealed by the Congress with the result that no portion of the tax levied by the Alabama Act may be credited upon the Federal tax, the Governor shall so proclaim; and that there-

after all moneys deposited in the Unemployment Trust Fund held by the Treasurer of the United States shall be requisitioned by the Alabama Unemployment Compensation Commission and be deposited in the State Treasury and returned ratably to the persons or concerns who had theretofore paid the taxes which went to make up said Unemployment Compensation Fund.

Finally, the Act is administered by the State Unemployment Compensation Commission, with an advisory council composed of representatives of employers, employees and the public (Sections 9, 10). The commission is required to set up, throughout the State, local offices to act as agencies for the payment of benefits and for employment. (Section 10).'

SPECIFICATION OF THE ASSIGNED ERRORS TO BE URGED

The appellants intend to rely upon the contentions that the specially constituted District Court erred:

1. In not granting the defendants' motion to dismiss the bill of complaint.

2. In not dismissing the bill of complaint as prayed in defendants' motion.

3. In not acting upon the defendants' motion to dismiss the bill of complaint.

The Alabama Statute as amended is contained in the appendix filed herewith, at page 5.

4. In perpetually enjoining the defendants from enforcing the Alabama Unemployment Compensation Act against the plaintiffs in any way by requiring contributions, reports or otherwise or by exacting fines, penalties or other punishments of the plaintiffs because of their failure to comply with such Act.

5. In enjoining the defendants from requiring of the plaintiffs the payment of the contributions and the filing of the reports required of them by the Alabama Unemployment Compensation Law.

6. In enjoining the defendants from exacting of the plaintiffs the fines, penalties, or other punishments provided for upon their failure to comply with the Alabama Unemployment Compensation Law.

7. In enjoining the defendants from enforcing the terms and provisions of the Alabama Unemployment Compensation Law against the plaintiffs.

8. In granting an interlocutory injunction enjoining the defendants, pending the final determination of the suit, from enforcing against the plaintiffs the terms, provisions and requirements of the Alabama Unemployment Compensation Law by requiring of the plaintiffs the contributions or reports thereunder or by exacting penalties, fines, taxes or imprisonment and from doing any act by themselves or their agents or representatives in the enforcement of said Law.

9. In holding the Alabama Unemployment Compensation Law to be unconstitutional and void be-

cause in conflict with the Fourteenth Amendment of the Constitution of the United States.

10. In holding the Alabama Unemployment Compensation Law to be unconstitutional and void because in conflict with Article 1, Section 23 of the Constitution of Alabama.

11. In holding the Alabama Unemployment Compensation Law to be unconstitutional and void as denying to the plaintiffs the equal protection of the law.

12. In holding that the Alabama Unemployment Compensation Law is a denial to the plaintiffs of the due process of law in that the classification of employers having eight or more employees is entirely arbitrary.

13. In holding that the classifications of employers contained in the Alabama Unemployment Compensation Law are so arbitrary as to render the Act unconstitutional and void as a denial of due process of law to the plaintiffs.

14. In holding that the plaintiffs have no adequate remedy at law in the premises.

15. In not dismissing the plaintiffs' bills of complaint.

16. In the rendition of the final decree in this cause filed and entered December 15, 1936.

THE REASON FOR UNEMPLOYMENT COMPENSATION

The depression beginning in 1931 brought to the attention of the people, of Congress and of the legislative bodies in the States, the problem of unemployment. The mere number of unemployed alone does not indicate the size of the problem, for to each unemployed worker it is fair to assume that there were at least three persons, dependent on his wages, thrown on the burden of public relief.

The burden was staggering not alone from the point of view of money, but also from that of administration. The problem was not only to find the money to relieve the unemployed, but it was also to find a way to distribute the relief and to give to the unemployed what most of them sought — the opportunity to find work. The United States Government had to assume the greater part of the load of public relief, thus interesting Congress and the administrative officers of the government in the problem of devising some plan which would make the burden in the future less onerous for the public treasury and which could be more effectively administered. Especially lacking in the earlier days of the depression was any facility for applying the work test, that is, for discovering whether the unemployed person seeking relief might not have found a job, which would not only have relieved the drain on the public purse, but would also have maintained his own morale. Those who held responsible positions during the terrible days when the depression was steadily growing worse and the number of unem-

ployed was increasing, or those called upon to take the responsibility of advising public officials, know how the immediate need called upon the energy and judgment of officials who should have been devoting their time to broad plans for coping with problems other than relief, which were confronting the government and the country. It was early perceived in the depression that unemployment was both a state and national problem, in the solution of which both agencies of government in the federal union were called upon to share, each operating in its proper sphere.

Facts Disclosed by the Depression

Hard pressed government officials, business men, labor leaders and experienced administrators in social work, as well as philanthropic societies, turned their attention to the study of the evil of unemployment and bent their efforts to devise some plan for coping with it, a plan which would be within the limitations of our national federal constitution and of the constitutions of the several states. Consideration of the problem made it evident that the depression had not created but had merely intensified the problem, that it was one of the capital problems of mass industry and that it must be dealt with in a permanent way. Unemployment had been a growing and serious result of our rapidly increasing industralization. Industry, even in the golden years of the 1920s, had peaks and hollows of activity with the resultant varying of unemployment which followed closely the ups and downs of the industrial curve, but was always a serious drain upon charity, public and

private. During the 1920s the unemployment varied from 14% in 1922 to 5½% in 1929, the lowest point, and for the other years ran about 8½% of the total number of employable persons. In figures this means that in 1922 there were 2,733,000 unemployed and in 1929 1,181,000 and the average in other years would be over 1,600,000.[1] These figures must, of course, be increased at least three times to get a true picture of the number of persons affected by unemployment, even in the best of times, and even the figures as adjusted, it is believed, are much below the truth, for they take but very roughly into consideration the fact that there were a large number of men unemployed for a month or more who were able to get back to work, but who may have become unemployed again after several months of weekly pay envelopes.

Unemployment has meant and will mean a steady drain on public relief. The expenditures for public relief follow closely up and down the rate of unemployment. This was true, during the period from 1926 through 1929; and when the crisis came in 1930 and was accentuated in 1931 and 1932, the relief expenditures, as is well known, jumped rapidly until the index of employment began to rise once more[2]. There was, therefore, even in years which we look back to as years of prosperity, a heavy burden on public relief caused by unemployment, and this

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[1]Estimates of Robert R. Nathan, Consultant, Committee on Economic Security, quoted in "Economic Brief for Appellees," cited in Chamberlin v. Andrews by the Department of Labor of the State of New York, p. 11, hereafter cited as Economic Brief.

[2]Economic Brief, p. 37.

burden was only a part of the total borne by the community through private charity and through the very much larger drain on relatives, on merchants who continue to supply their customers during periods of unemployment, and on house owners whose rent is unpaid.

What one might call the normal unemployment is a necessary consequence, both of our system of industrialization, particularly on a large scale, and of the fluctuations, seasonal and cyclical, in business. If business were always steady, then the great steel mills in Birmingham, coal mines and other industries, could offer steady employment to a steady group of workers; but this situation never obtains, so that there must always be a pool of unemployed workers from which employers may draw recruits as business improves and into which they return when business is slack.

When industry is booming the great steel mills or automobile factories call into the cities where there are located workmen from other districts in the state and perhaps from other states. When business becomes slack unemployment results, and the cities in which the mills or factories are situated find themselves faced with the duty of taking care of workers often imported from other districts for the benefit of the employer. When a serious depression like that of 1922 or that of 1931 strikes a region, it is the local taxpayers, charitably inclined persons, the smaller shop keepers and the owners of houses the rent for which cannot be paid, and after them the taxpaying farmers and land owners of the whole

state, who must (under the situation which prevailed prior to the enactment of the statute under consideration) provide the money to take care of the relief load.

Another reason for the creation of a system of unemployment compensation lies in the rapid change in employment caused by improvements in machinery which, it is well known, throw men at least temporarily out of work, even in the time when prosperity is at its height. Labor saving machinery is installed in a plant to save labor, but saving labor means creating less employment in the plant. The best evidence of the greater instability of employment during the recent prosperous period of the 1920s as over preceding periods is shown in the fact that:

> Between 1923 and 1929 men were being turned out of manufacturing industries in greater numbers than in pre-war years, while the numbers of new men taken on were relatively much smaller. High productivity and rapidly expanding production brought instability of employment and uncertainty of income to many, during this era of business prosperity.[1]

In a period of prosperity, many men who have lost their positions in factories and in railroads will eventually find work elsewhere but they will not find it promptly and society must bear the burden in one

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[1]R. C. Mills "Economic Tendencies in the United States," National Bureau of Economic Research, Inc., (1932) Cited Economic Brief. pp. 87-88.

way or another of the lapse of time that must ensue while the unemployed person is hunting for work, especially where that work must be found in an occupation different from that at which he was formerly employed.

UNEMPLOYMENT INSURANCE AS A REMEDY

The facts outlined above, both as to the extent and effect of unemployment and as to the inadequacies of existing methods of dealing with the problem, are, and were, at the time of the enactment of the Alabama Act, matters of common knowledge. They had been set forth in reports of the Committee on Economic Security to the President in 1935, in reports of governors and legislative committees in New York State in 1930-1933, and in many books and articles. It is not surprising that officials, both in the Federal and State Governments, sought solutions of the problem in the establishment of systems of unemployment insurance. Similar systems had been tried and found practical in Great Britain and many foreign countries.[1]

Since the Federal Government had been obliged to contribute great sums to relief and had been obliged to assume a large share in the administration of the relief and the effort to put men back to work, the act of Congress, passed after careful consideration of the subject and with full recogni-

[1]Sir William Beveridge, Unemployment, a Problem of Industry (1931).

tion of the importance of preserving the rights and obligations of the states, included a provision allowing a deduction from the federal tax of the amounts paid under any state unemployment insurance law. The Alabama Act is designed to take full advantage of the aid given the various states under the Federal Social Security Act. As a consequence of the act of Congress, the steel industry in the country as a whole is placed on a footing of equality. The percentage of wages which is paid by plants owned by the United States Steel Corporation in Birmingham will be matched by that paid by the same company in Illinois, Indiana or Pennsylvania and by all competing steel companies whether the states where they are located pass acts or not. As a consequence, the steel industry in the country will bear a level burden, so that if the burden proves too heavy it can be shifted to consumers.

Unemployment insurance is designed to meet the problem of unemployment in part by setting up a reserve fund collected during periods of prosperity from employers who were profiting by the business activity, and from employees who presumably shared in the profits of industry in such periods. This reserve fund would, during a depression, relieve the burden on the taxpayers of the city and the state, the great majority of whom had not shared directly in the profits of industrial prosperity, and would facilitate the payment of unemployment benefits without increase in the payments of contributions by employers.

But the unemployment insurance system goes further than the mere maintenance of this great re-

serve, useful as experience has shown it to be in times of emergency. It also will relieve the increasing strain caused by unemployment in ordinary times. The system provided to accomplish this result is set up by the state legislature in its own act and will be enforced solely by state officers with such adjustments as the legislature may introduce in the light of experience. Unemployment insurance is not intended to take care of the idle. It provides only for the man who, although willing to work, cannot find a job. No one can receive benefits unless he can show that he has worked within the state for a specified number of weeks. The amount of his benefits and their duration will be measured by his previous employment. The beneficiary will, therefore, have worked for his benefits and, under the Alabama act under which the employee pays part of the contribution, will have contributed to the fund from which he is paid. More than that, the plan sifts out the man who will not work. An unemployed person asking relief must apply at the employment office of his district, and must accept any suitable employment which is offered him. If he does not do so, he loses the right to receive benefits during the period of his refusal. Clearly a worker cannot be required to act as a strike breaker, and there are other limitations on work which he is required to accept; in principle, however, the system is devised to help only the employee who is willing to work, but for whom a job cannot be found.

The payment of benefits, therefore, will help tide a worker over the period between jobs and will thus relieve the burden which, as has already been

shown, unemployment places on the public. It will not relieve the whole strain, for the amount of benefits is small enough so that the worker himself must bear a large part of the loss in earnings consequent to idleness, a further incentive for him to make use of the opportunities offered to find a job. Furthermore, the benefits of the insurance are not intended to take care of the person who for any reason is unemployed for a long period. He cannot receive in any fifty-two weeks more than sixteen weeks of unemployment benefits. If he cannot find work within this period, he must then be helped in some other way. In ordinary times, however, this period will in most cases be enough to enable the man who loses a job in a manufacturing industry, for example, and who is not likely to get it back, to try to find some position in some service trade where there may be a demand for labor. The employment offices will have it as their duty to encourage him to find new employment. Even during the worst of the depression there were a great many workers who had employment for intervals. Unemployment insurance, by providing a reasonable work test, should greatly improve the chances that in times of depression an unemployed person would be taken off the relief rolls through getting a job, even though temporary.

Another advantage of the system of unemployment insurance is the comparative stabilization of the spending power of industrial workers. The cessation of wages consequent upon unemployment and the resulting decrease of purchasing power of industrial workers is widely recognized as an outstanding feature of economic depressions, and an

important factor with respect to their severity. This stabilization might be statewide in case of a statewide recession in business, or it might be local in case a plant in a particular city slowed down or went out of business. The drafts upon the reserve fund would maintain for a period the spending power of men thrown out of work and therefore the returns from business of the shop keepers and house owners who depend upon this spending.

It may be argued that there are certain plants which have shown steady employment during the last few years. No one can be sure that these plants will continue to have such good fortune. At any time a change in style of product, a rapid increase in the number of plants in a particular field, may bring about a decline in the business and profits of a particular plant which had previously been prosperous, with the result that a number of its workers will be thrown unexpectedly into the class of the unemployed. If a plant has a better employment record than others, the act provides for a reduction in the amount to be paid as contribution, and the federal act, with a corresponding provision, will provide for a reduction in the tax, so that the employer who benefits by the credit rating under the state law will not find that benefit nullified by the requirements of the federal law. The federal provision, however, takes effect only after three years of compensation experience. (Sec. 910 (a) (1)). Under the Ala-

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Note—We refer for economic facts to the Economic Brief for Appellees filed in this Court by the Attorney General of the State of New York in the case of W. H. H. Chamberlin v. Elmer F. Andrews, Industrial Commissioner of the State of New York, et al. October Term, 1936.

bama Act experience rating is permitted in 1941, so that the date fixed by the Alabama law for the beginning in rates based on experience approximates to the provisions of the federal law.

SUMMARY OF ARGUMENT

Three propositions are urged by the State in answer to the contention that the Alabama Unemployment Compensation Act violates the due process and equal protection clauses of the Fourteenth Amendment:

1. *The cost of unemployment compensation may be placed on industry.*

In support of this contention, the State, after pointing out the reasons for unemployment compensation (p. 16), relies upon the analogy of workmen's compensation laws, treating the cost of industrial accidents as part of the cost of production —just as the present law treats the cost of industrial unemployment as part of the cost of production (Arizona Employer's Liability Cases, 250 U. S. 400.) The State further relies upon precedents in the form of minimum wage laws, bank deposit guaranty laws and similar legislation (West Coast Hotel Co. v. Parrish, U. S. ...., decided March 29, 1937; Noble State Bank v. Haskell, 219 U. S. 104, to show that contributions may be exacted of a group whose activities are reasonably related to the conditions to be relieved, even though, in the first instance, the benefits accrue to a different group of individuals.

2. *The classifications in the Act are valid.*

Employers of less than eight are shown to be exempted from the operation of the Act upon the ground that unemployment is less prevalent in small establishments than in large ones, and the exemption is sustained upon the principle that the legislature has power to draw the line somewhere, hitting the evil "where it is most felt" (West Coast Hotel Co. v. Parrish, supra.) The exclusion of specified occupations such as agricultural labor and domestic service rests upon numerous cases upholding statutes which grant identical exemptions (New York Central Railroad Co. v. White, 243 U. S. 188). Further support for these basic classifications comes from a practical consideration of the administrative workability of the statute, recognizing that the collection of contributions from small employers, farmers, housewives, etc., is almost an insuperable difficulty at the present time (Hatch v. Reardon, 204 U. S. 152).

3. *The pooling of funds is permissible.*

Railway Retirement Board v. Alton Railroad, 295 U. S. 330, is not only distinguished, but is shown to support the pooled fund established in the Alabama Act. It, together with other cases, reveals that the pooling of funds, if reasonable, is a legitimate administrative device, and that pooled funds will be condemned only when based upon a disregard of known facts. The scarcity of information as to the probability of future unemployment

in any given plant or industry shows that the legislature has adopted a wise and cautious policy, rather than a capricious one, and that it has done all that it can safely do by its provision for "merit rating" after the year 1941.

Point I deals briefly with the question of the validity of the Act under the Alabama constitution, pointing out that the decision by the Supreme Court of Alabama on March 18, 1937, in the case of Beeland Wholesale Co. v. Kaufman, makes it necessary for this court to reverse the holding of the court below on matters involving the state constitution. Point III is confined to the contention that the Social Security Act is not an invasion of the powers of the State of Alabama. The argument for the validity of Title III and Title IX of that Act will be made by the Government.

ARGUMENT

I.

THE ALABAMA UNEMPLOYMENT COMPENSATION ACT DOES NOT VIOLATE ANY PROVISION OF THE CONSTITUTION OF ALABAMA.

In view of the supervening decision by the Supreme Court of Alabama in Beeland Wholesale Co. v. Kaufman, decided March 18, 1937, and now in manuscript, the full text of which appears in the

Appendix, p. 43, that the Alabama Act is valid and free of any objection under the state constitution, the holding by the court below can no longer stand. Chicago, M. St. P. & P. R. Co. v. Risty, 276 U. S. 567, 570; Hawks v. Hamill, 288 U. S. 52.

II.

THE ALABAMA UNEMPLOYMENT COMPENSATION ACT DOES NOT VIOLATE THE REQUIREMENTS OF DUE PROCESS OF LAW OR EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

The basic problem as to the validity of the Alabama Unemployment Compensation Act is whether it is unreasonable, arbitrary or capricious, and whether the means selected have a real and substantial relation to the object sought to be attained. The specific questions involved in this inquiry are: 1. May the cost of a system of unemployment compensation be placed upon employers and employees? 2. Are the classifications in the Act valid? 3. Is the pooling of funds permissible?

1. *The Cost of Unemployment Compensation May Be Placed on Industry.*

The main force of the attack on the Alabama Act is that it imposes a heavy burden on industry, particularly upon employers, for the benefit of others. The justification for placing the cost upon industry

lies in the close factual connection between industry and unemployment, and in the well-recognized principle that contributions may be exacted of a general group or class whose activities are reasonably related to the conditions to be relieved, even though the benefit may, in the first instance, be conferred upon a particular group or class.

As was said in the recent case sustaining minimum wage legislation:

> "What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. . . The community is not bound to provide what is in effect a subsidy for unconscionable employers." West Coast Hotel Co. v. Parrish, ... U. S. ....., (decided March 29, 1937).

The success of the device for making industry pay the costs of industry is demonstrated by the workmen's compensation cases. The present statute, recognizing that the cost of industrial unemployment is, like the cost of industrial accidents, a part of the cost of industry, merely embodies and applies the principle of workmen's compensation.

> "It is reasonable that the business should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing the loss upon the employer in the first instance we throw it upon the people in the long run and that is just. If a Legislature should reason in this way and act accordingly it seems to me that it is within Constitutional bounds." Arizona Employers' Liability Cases, 250 U. S. 400, 433.

See also Mountain Timber Co. v. Washington, 243 U. S. 219, sustaining the Workmen's Compensation Act of the State of Washington. And in Sheehan v. Schuler, 265 U. S. 371 (holding that the employer of a deceased workman, if no person was entitled to benefits under the New York Compensation Act, might be made to pay $1000 into a state fund, half of which was to be used for paying additional compensation to employees incurring permanent total disability after permanent partial disability, and half for vocational rehabilitation), this Court said:

> "We do not think that the due process clause of the Fourteenth Amendment requires that such additional compensation to injured employees of the specified classes should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created."

Other examples of statutes which have required contributions of a group whose activities are closely related to the situation confronting the legislature, even though the immediate benefits thereof inure to other individuals, are familiar. In Noble State Bank v. Haskell, 219 U. S. 104, this Court sustained an Oklahoma statute which assessed every bank one per cent of its average daily deposits to create a fund out of which to secure full repayment of the deposits in any bank that failed. Justice Holmes speaking for the Court wrote:

> "In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Hyland Boy Gold Mining Co., 200 U. S. 527-531, 26 S. Ct. 301, 50 L. Ed, 581, 4 Ann Cas. 1174; Offield v. New York, New Haven and Hartford Railroad Co., 203 U. S. 372, 27 S. Ct. 72, 51 L. Ed. 231; Bacon v. Walker, 204 U. S. 311, 315, 27 S. Ct. 289, 51 L. Ed. 499. And in the next it would seem that there may be other cases beside the every day one of taxation in which the share of each party in the benefit of a scheme for mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. At least, as we have a case within the reasonable exercise of the police power as above expressed no more need be said."

The doctrine of the Oklahoma bank cases is not limited to the relatively small assessment of 1 percent. By an act passed after the suit was begun the assessment was increased to 5 percent. Moreover, it appears from the opinion that "additional assessments if required" might be made for the purpose of paying depositors in full. For a further illustration of the operation of bank deposit guaranty laws and the substantial burden imposed under them, see Abie State Bank v. Bryan, 282 U. S. 765 (1931).

The Head Money cases, 112 U. S. 580, sustained a statute by which Congress imposed a tax on steamship companies of fifty cents for each alien brought into the United States, to be paid by the owner of the ship transporting such aliens. The money was paid into a special fund to be used for the care and relief of immigrants who might become indigent and therefore a public burden. State v. Cassidy, 22 Minn. 312, upheld a tax on saloonkeepers to create a fund for the erection and maintenance of an institution for inebriates. The dog tax cases, upheld state acts imposing a tax upon dogs in order to create a fund out of which to pay sheep owners for losses suffered by the killing of their sheep by dogs, the tax being imposed upon all dog owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Cole v. Hall, 103 Ill. 30. It has also frequently been held that fire insurance companies may be required to contribute to and maintain a fund for the benefit of sick and disabled firemen. Fire Department v. Helfenstein, 16 Wis. 136.

Finally the principle of cost allocation illustrated in the preceding cases was accepted and applied in four cases sustaining respectively, the unemployment compensation laws of Massachusetts, New York, California and Alabama (Howes Bros. v. Unemployment Compensation Commission, ... Mass. ..... (.....); Chamberlin v. Andrews, 271 N. Y. 1 (1936), affirmed by an equally divided court, 57 Sup. Ct. 122 (1936); Gillum v. Johnson, 62 P (2d) 1037 (1936); Beeland Wholesale Co. v. Kaufman, ... Ala. ..... (1937)).

2. *The Classifications in the Alabama Act are Valid.*

The contention that the Alabama Act violates the guaranty of equal protection of the laws centers on the exemption of certain classes of occupations from the coverage of the statute and the exclusion of employers who have less than eight workers in their employ.

The exempt occupations are set forth in the margin.[1] The only one of them with reference to which

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[1] (1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer, bar pilot, or member of the crew of a vessel on the navigable waters of the United States.

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a carrier engaged in interstate commerce and subject to the Act of Congress known as The Railway Labor Act; as amended or as hereafter amended. Service

any serious contention is made, is agricultural labor. This exemption is identical with that found in workmen's compensation laws, which have uniformly been sustained. In New York Central Railroad Company v. White, 243 U. S. 188, this court said:: "The exclusion of farm laborers and domestic servants from the scheme of the Act may not be judicially declared an arbitrary classification within the protection of the law." Similarly with regard to the other occupations not covered by the Act. For example, the exemption of charitable organizations, domestic service, and services within the family relationship are of a type long familiar to the Federal Income Tax Laws and were expressly upheld in Flint v. Stone Tracy Co., 220 U. S. 107. Classifications of this character are equally valid under state laws. See Aero Transit Co. v. Georgia Commission, 295 U. S. 285; Utah Power and Light Co. v. Pfost, 286 U. S. 165.

The division of employers into those who employ eight or more workers and those who employ less

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performed by those engaged as solicitors or agents for Insurance Companies.

(7) Service performed in the employ of a state or political subdivision thereof, or an instrumentality of one or more states or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

[Sec. 2(g) of the Alabama Act.]

than eight requires somewhat fuller consideration.[1] This classification is based upon the widely held belief that large firms experience more severe fluctuations in employment than small ones. The only available studies of this subject sustain the belief. National Industrial Conference Board, Inc. *Mergers in Industry*, 1929, King, Williford I., *Employment, Hours and Earnings in Prosperity and Depression*, 1923; Hansen, A. H., Bjornaraa, D., and Sogge, T. M., *Decline in Employment in the* 1930-31 *Depression in St. Paul, Minneapolis and Duluth*, 1932. Hansen N. H. et al., *A Program for Unemployment Insurance and Relief in the United States*,. 1934, pp. 33-39. Whatever be the exact facts and figures, it cannot be said that the legislative conclusion that the small employer does not contribute substantially to the real unemployment problems is either entirely capricious or lacks any reasonable basis. As said in Borden's Farm Products Company, Inc. v. Peter G. Ten Eyck, 80 L. Ed. 669, 297 U. S. 251; 56 S. Ct. 453: "Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary."

Classifications based on size or number within a generic group have been sustained. Bradley v. Rich-

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[1](f) "Employer" means any person, partnership, association, corporation, whether domestic or foreign, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, who or whose agent or predecessor in interest has employed **at least eight persons** in employment subject to this Act within each of twenty or more calendar weeks in the year 1935 or any subsequent calendar year. [Section 2(f) of the Alabama Act.]

mond, 227 U. S. 477; Metropolis Theatre Co. v. Chicago, 228 U. S. 61; Quong Wing v. Kirkendall, 223 U. S. 59. "This court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." West Coast Hotel Co. v. Parrish, ... U. S. ..... (decided March 29, 1937). It was necessary to draw the line somewhere. In like situations, this Court has held that it is within the discretion of the legislative body to designate the number which constitutes the dividing line. Jeffrey Mfg. v. Blagg, 235 U. S. 571, (classification of five or more employees). St. Louis Cons. Coal Co. v. Illinois, 185 U. S. 203 (exempting mines employing not more than five men); McLean v. Arkansas, 211 U. S. 539, (exempting mines employing less than ten men underground).

Furthermore, the classifications in the Act, including both the exemption of employers of less than eight individuals and the exemption of certain occupations, are based on and justified by practical administrative considerations. The difficulties in requiring the maintenance of proper records by employers of a few employees, and the almost impossible task in the case of housewives or farmers, give an adequate basis for the distinction. The expense of collection might well exceed the contributions re-

ceived and collectible. Similarly with respect to agents or solicitors of insurance companies, the difficulties in determining the wages justify the exemption. This Court has long recognized that the public need for practicability, speed, and convenience in the administering of a statute will often justify certain minor inequities which might have been avoided in a more "perfect" but less workable plan. New York v. Latrobe, 279 U. S. 421; Hatch v. Reardon, 204 U. S. 152.

3. *The pooled fund established by the Alabama Act is valid.*

The Alabama Act requires all employers of eight or more to pay the same percentage of their pay rolls into the Unemployment Compensation Fund, thus, it is contended by the appellees, treating alike those who are dissimilarly situated. The appellee's chief, if not sole, reliance in this respect is Railroad Retirement Board v. Alton Railroad, 295 U. S. 330. But the difference between the two Acts involved makes the Railroad Retirement Case inapplicable, and the authorities sustaining pooling in other situations applicable.

The Railroad Retirement Case does not condemn *all* pooling. Prior decisions, which have sustained the pooling principle when properly applied (e. g. Mountain Timber Co. v. Washington, supra, and Noble State Bank v. Haskell, supra) were cited with approval in the Pension Case, and their holdings reaffirmed. When the objectionable features enumerated in that case are analyzed, it is seen that each

of them has its fundamental basis, not in the existence of a pooled fund, but in the failure of the framers of the Railroad Pension Act to heed known and available information which, if it had been considered by the Congress as it was considered by the Court when presented in litigation, would have shown disparities between the contributors so great as to make equal contributions from them an unreasonable requirement. Pooling in and of itself is not a violation of due process. This is apparent from the very words of the court in distinguishing the Mountain Timber Company case: "The challenge of the employers was that the statute failed of equitable apportionment as between the constituted classes. But no proof was furnished to that effect, and this court assumed that the classification was made in an effort at fairness and equity as between classes." (at p. 359.)

Whether the grouping together of all employers of eight or more under the Alabama Act is "made in an effort at fairness and equity" may be seen from the Act itself. In the first place, *all* employers are not treated alike: only employers of eight or more are covered. Hence there is some classification. It is a classification based upon the knowledge that the unemployment hazard is greater in large concerns employing many workers than in small concerns employing few. Furthermore, provision is made in the Act for a closer correlation in the future between the amount of contribution required of any given employer and the unemployment hazard created by the industry of which he is a part. Section 4 of the act provides that rates of contribution, after 1941, are

to be based upon a classification of employers according to unemployment hazard, which classification is to be made by the commission upon the basis of past experience. It is interesting to note in this regard that the New York act involved in Chamberlin v. Andrews, did not contain such an explicit provision for merit rating as is contained in the Alabama act. The New York act merely provided that the Commission was to study the feasibility of merit rating. The Federal Social Security Act, it will be remembered, allows credit for merit-rating in deduction from the payroll tax only on the basis of three years of compensation experience, that is, in no case before the year 1941 (Sec. 910, Federal act). Hence merit rating before that time would be of no value to employers of Alabama.

A further justification for the pooling of funds at the present time is the fact that dependable information is scarce—indeed practically non-existent—as to the unemployment hazard in Alabama. While it is not to be denied that variations in unemployment exist as between different firms and industries, the future amount of unemployment in any given establishment cannot now be accurately judged. Style trends, new competitors, technilogical changes, tariffs and other factors causing unemployment appear, on the basis of present information, as likely to affect one business as another. The legislature cannot be blamed for failing to make nice distinctions when to do so would be to make the rates of contribution levied dependent upon sheer guess work. "The Fourteenth Amendment is not a pedagogical requirement of the impracticable,"

Holmes, J., in Dominion Hotel, Inc. v. State of Arizona, 249 U. S. 265, 268 (1919). Nor is it a mandate requiring mathematical perfection. "Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind, can view it, is a baseless dream, as this court has said more than once." Head Money cases, supra, at p. 595. When the information as to unemployment hazard becomes available through past experience the rates of contribution will be varied in accordance therewith. This is specifically provided for in the act. To hold that an unemployment compensation plan could not be put into effect until a reliable system of "merit rating" could be devised would be to permanently enjoin the establishment of an unemployment insurance system for the lack of immediate perfection in detail.

Another factor establishing the reasonableness of the grouping together of employers of eight or more is the necessity of having a fund of this character in order to provide a broad base upon which reserves may be accumulated, and in order to lessen the dangers of serious drains on its resources during severe periods of unemployment. Hence, in the exercise of its discretion, the legislature provided a two-year period for the accumulation of a reserve fund before the making of payments; this avoids any drain on the funds until a sufficient sum is available to make the payments which may be required.

Finally, the absence of a more definite classification of employers than now exists under the Alabama act is justified by a realistic view of the prob-

lem of unemployment. The mere fact that an employer discharges a workman does not show that that employer is the one responsible for the unemployment. The causes of unemployment are far deeper. They relate to business as a whole. This is illustrated by contrasting the "consumer goods industries," which are reputed to cause very little unemployment, with the "durable goods industries," which are often said to be the major offenders. Even though dealers in consumer goods keep all their workers employed during a depression, their volume of sale and hence of purchase from the stable goods industries may be greatly diminished. Who is to blame for the resulting unemployment in the "durable goods" industries? If a public utility company constructs a hydro-electric plant, ceasing its consumption of coal, and the coal miner from whom the utility formerly purchased is forced to discharge his workmen, who should be considered responsible for the unemployment? The decision of the Alabama Legislature to move slowly and to treat alike for the time being all employers of eight or more seems to demonstrate, not that the legislation under consideration is "unreasonable," but rather that it is the result of a sound and cautious legislative policy. The highest courts of Massachusetts, New York, and California, have found nothing unreasonable in their Unemployment Compensation Acts, based on pooled funds in all essentials the same as that established in the Alabama Act.

III

TITLE III AND TITLE IX OF THE SOCIAL SECURITY ACT ARE WITHIN THE DELEGATED POWERS OF THE CONGRESS AND DO NOT VIOLATE ANY LIMITATIONS UPON THOSE POWERS.

The argument on the merits for the validity of Title III and Title IX will be presented by the Government in its brief in George C. Steward Machine Company v. Davis, Collector of Internal Revenue and at the bar. We support that argument.

In the court below, as well as in the Supreme Court of Alabama, we contended that the Alabama Unemployment Compensation Act was independent of the Social Security Act and that it was not necessary for the validity of the federal Act to be determined in order to settle the validity of the state law. But the Supreme Court of Alabama has since decided (see the opinion in the Beeland case, appendix, p. 43, delivered on March 18, 1937) that the Alabama statute is dependent upon the federal Act and that it was necessary for that Court to express its opinion as to the validity of the unemployment features of the federal Act. The court then concluded that the tax levied under Title IX upon certain employers is valid whether deemed independent of or as unified with the appropriation made under Title III as an aid to the State in the administration of its unemployment compensation law.

In the language of the Supreme Court of Alabama, the Alabama Act "ties into" the federal Act and "forms a part of a nation-wide economic scheme" provided for by the latter. "Unless it is tied up to such a wide-spread program, it probably could not have the influence on economy which is the foundation for its existence. It would be useless, perhaps, for one state to try to effect economic stability in respect to a situation which knows no state boundaries."

In view of the decision of the Supreme Court of Alabama, we no longer contend that the state statute is independent of the federal Act. Without arguing whether it is or is not necessary for this Court to pass upon the validity of the federal Act in order to dispose of the cases at bar, we suggest that it is in the interest of the State to have the validity of the plan of unemployment compensation settled to the extent that it is permissible to settle it in the cases now before this Court.

We have uniformly contended that Titles III and IX of the Social Security Act are within the delegated powers of Congress and that they do not violate any limitations upon those powers. Particularly do we urge, as supplementary to the Government's argument, that Title III and Title IX, taken singly or together, do not invade the reserved powers of Alabama. The unemployment compensation features of the Social Security Act avoid the defects of other statutes which have been condemned by this Court as in violation of the powers of the States. Here

there is no overreaching of the state government, nor any coercion on that government. There is no attempt by the central government to control the individual. There is no disruption of the Federal system. On the contrary, here is a cooperative plan, designed to bring out the full advantages of the Federal system, and fitted to the form of government established by the Constitution. It is the law of the state which establishes the system of unployment compensation in Alabama.

CONCLUSION

On the basis of the authorities and decisions hereinabove cited and quoted from, we respectfully submit that the special District Court erred and that its decree should be reversed.

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I hereby certify that I have delivered a copy of the foregoing brief and argument to the counsel of record for the appellees in the above styled cases.

This the ..... day of April, 1937.

.....
of Counsel.